Filed 9/28/02 P. v. Ramirez CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. LUIS ANTONIO RAMIREZ, Defendant and Appellant.	B150110 (Super. Ct. No. VA059011)

APPEAL from a judgment of the Superior Court of Los Angeles County, John A. Torribio, Judge. Reversed with directions.

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc E. Turchin, Supervising Deputy Attorney General, and Jeffrey B. Kahan, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Luis Antonio Ramirez, appeals from his convictions for five counts of lewd conduct in violation of Penal Code section 288, subdivision (a). He contends: his pretrial motion to disclose peace officer personnel records should have been granted; his motion to suppress his confession should have been granted; and there was instructional error. We conclude the trial court should have conducted an in camera review of the relevant peace officer personnel records. We therefore conditionally reverse the judgment so as to require an in camera review of the peace officer personnel records and make other findings. We reject defendant's remaining contentions concerning reversible error.

II. PEACE OFFICER PERSONNEL RECORDS

Prior to trial, defense counsel filed a motion to compel disclosure of peace officer personnel records. The declaration of defense counsel, Rickard Santwier, in support of the motion states, "The defendant contends that an April 5, 2000 interview of him at Twin Towers was obtained by use of illegal police conduct and use of force, in violation [of] Mr. Ramirez' right to remain silent and in violation of his request for an attorney right then." Later, Mr. Santwier's declaration states, "[T]he statements are the product of improper tactics and should be excluded from his trial." The factual basis for this position was as follows as reflected in Mr. Santwier's declaration: in response to information concerning the present charges provided by Los Angeles Police Department investigators, defendant was confronted by Compton Police Department officers and shot on March 26, 2000; immediately after being shot, defendant was handcuffed; the district attorney's office declined to file a felony complaint citing the need for medical reports and an "interview of suspect"'; on April 5, 2000, three sheriff's deputies were present in the Twin Towers Correctional Facility and defendant was advised of his constitutional

rights; and defendant asked for an attorney '"right now."' Mr. Santwier's declaration states, "Mr. Ramirez says one of the officers squeezed his hand and wrist (where he had pins inserted), and the officers pulled on Ramirez' arm." Defendant then agreed to speak with the deputies. Mr. Santwier's declaration states, "Mr. Ramirez then made numerous admissions." Mr. Santwier's declaration also stated in reference to defendant, "He also denies making any admissions . . . ." The trial court denied the motion to compel disclosure of peace officer personnel records of the deputies who were present when the prosecution contends defendant confessed. The basis of the ruling was that defendant denied making any admissions.

We examine the trial court's rulings concerning peace officer personnel records for an abuse of discretion. (*Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 390-391; *People v. Gill* (1997) 60 Cal.App.4th 743, 749.) Mr. Santwier's declaration disclosed defendant claimed he never confessed but the deputies said he did. Mr. Santwier's declaration alleged defendant's arm was squeezed where there were pins which had been inserted as part of the treatment for the shooting. No counter-declarations were filed. Mr. Santwier's declaration contained plausible and specific factual allegations of perjury and coercion by the sheriff's deputies. (*People v. Memro* (1985) 38 Cal.3d 658, 680-684 [police misconduct during interrogations]; *People v. Hustead* (1999) 74 Cal.App.4th 410, 415-423 [material misstatements in a police report and violence]; *People v. Gill*, *supra*, 60 Cal.App.4th at pp. 747-751 [aggressive police behavior and violence].) The fact that defendant denied he confessed does not alter our conclusions. In connection with the pretrial motion to suppress his confession, the trial court could conclude there was violence if a deputy had engaged in such conduct in the past. The jury could also conclude that defendant never confessed and the deputies were lying about what occurred during the confession. Therefore, in failing to conduct an in camera hearing, the trial court's ruling was beyond the scope of allowable judicial discretion.

The correct remedy in a case such as this is to conditionally reverse the judgment. Upon issuance of the remittitur, the trial court is to conduct an in camera hearing on defendant's discovery motion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226; *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83; Evid. Code, § 1043, subd. (b).) If the in camera hearing reveals no discoverable information in the deputies' personnel files which would lead to admissible evidence helpful to defendant's defense, the trial court shall reinstate the original judgment and sentence which shall stand affirmed. If the in camera hearing reveals discoverable information bearing on the a deputy's honesty or use of violence in the interrogation context which could lead to admissible evidence helpful to the defense, the trial court shall order disclosure and allow defendant an opportunity to demonstrate prejudice. If prejudice is demonstrated, a new trial shall be ordered by the trial judge. Defendant may of course appeal from post remittitur orders if the trial judge reinstates the judgment. (Pen. Code, § 1260; *People v. Hustead*, *supra*, 74 Cal.App.4th at pp. 422-423; *People v. Gill*, *supra*, 60 Cal.App.4th at pp. 750-751.) The deputies may seek appellate review via a petition for extraordinary relief from any disclosure orders. (See *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, __-__ [124 Cal.Rptr.2d 202, 205-206]; *Garden Grove Police Department v. Superior Court* (2001) 89 Cal.App.4th 430, 431-432.)

III. DEFENDANT'S CONFESSION

Defendant contends his confession should have been suppressed. Defendant argues that he asserted his right to counsel twice before finally agreeing to speak with the deputies. But there is no evidence to support this contention. Mr. Santwier stated that the documents which indicated there were assertions of the right to silence were by the police officers who were involved in the shooting of defendant. In any event, defendant requested to speak with the deputies after initially asserting his right to counsel. No violation of *Miranda v. Arizona* (1966) 384 U.S. 436, 444-445 occurred. (*McNeil v.*

Wisconsin (1991) 501 US. 171, 176-177; *People v. Cunningham* (2001) 25 Cal.4th 926, 992.)

IV. INSTRUCTIONAL ERROR CONTENTION

Defendant contends his Fourteenth Amendment Due Process Clause rights were violated when the jury was not instructed pursuant to CALJIC No. 4.71.5.[1]

First, there is no requirement imposed by the Fourteenth Amendment Due Process Clause to instruct pursuant to CALJIC No. 4.71.5 when the jury is instructed on the burden of proof, reasonable doubt, and the unanimity requirement pursuant to CALJIC Nos. 2.90 and 17.50. Second, because the federal Constitution does not require that CALJIC No. 4.71.5 be read to the jury when there is instruction pursuant to CALJIC Nos. 2.90 and 17.50, the appropriate test of reversible error is that set forth in *People* v. *Watson* (1956) 46 Cal.2d 818, 836. Under that standard, the state constitutional error was harmless. Third, even if the *Chapman v. California* (1967) 386 U.S. 18, 22 standard of reversible error is applicable, the judgment should still be affirmed.

First, the United States Supreme Court has explicitly set forth the standard of evaluating the constitutionality of reasonable doubt instructions under the Fourteenth Amendment Due Process Clause in *Victor v. Nebraska* (1994) 511 U.S. 1, 5 as follows:

---

1 CALJIC No. 4.71.5 states: "Defendant is accused [in Count[s] _____] of having committed the crime of _____, a violation of Section _____ of the Penal Code, on or about a period of time between _____ and _____. [¶] In order to find the defendant guilty, it is necessary for the prosecution to prove beyond a reasonable doubt the commission of [a specific act [or acts] constituting that crime] [all of the acts described by the alleged victim] within the period alleged. [¶] And, in order to find the defendant guilty, you must unanimously agree upon the commission of [the same specific act [or acts] constituting the crime] [all of the acts described by the alleged victim] within the period alleged. [¶] It is not necessary that the particular act or acts committed so agreed upon be stated in the verdict."

"The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. Cf. *Hopt v. Utah*, 120 U.S. 430, 440-441[] (1887). Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, see *Jackson v. Virginia*, 443 U.S. 307, 320, n. 14[] (1979), the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Cf. *Taylor v. Kentucky*, 436 U.S. 478, 485-486 [] (1978). Rather, 'taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.' *Holland v. United States*, 348 U.S. 121, 140 [] (1954)." There is a difference between instructions mandated by the Due Process Clause of the Fourteenth Amendment and instructional error which does not violate the federal Constitution. In *Victor v. Nebraska*, *supra*, 511 U.S. at pages 16-17, the Supreme Court noted its disapproval of the use of the words "moral certainty" in reasonable doubt instructions. Yet despite the fact that the use of the term "moral certainty" in the context of reasonable doubt instructions was deemed inappropriate, the Supreme Court did not hold there was a Fourteenth Amendment Due Process Clause violation. The court noted: "We do not think it reasonably likely that the jury understood the words 'moral certainty' either as suggesting a standard of proof lower than due process requires or as allowing conviction on factors other than the government's proof. At the same time, however, we do not condone the use of the phrase. As modern dictionary definitions of moral certainty attest, the common meaning of the phrase has changed since it was used in the *Webster* instruction, and it may continue to do so to the point that it conflicts with the [*In re Winship* (1970) 397 U.S. 358] standard. Indeed, the definitions of reasonable doubt most widely used in the federal courts do not contain any reference to moral certainty. See Federal Judicial Center, Pattern Criminal Jury Instructions 28 (1988); 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 11.14 (3d ed. 1977). But we have no supervisory power over the state courts, and in the context of the instructions as a whole we cannot say that

the use of the phrase rendered the instruction given in Sandoval's case unconstitutional." (*Victor v. Nebraska*, *supra*, 511 U.S. at pp. 16-17.) The analysis in *Victor* concerning the limited application of the Fourteenth Amendment Due Process Clause to instructional errors in state court trials is consistent with other United States Supreme Court authority. (See *Sochor v. Florida* (1992) 504 U.S. 527, 538 [factually unsupported capital case instruction did not violate due process]; *Estelle v. McGuire* (1991) 502 U.S. 62, 73 [‘“Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation”’]; *Dowling v. United States* (1990) 493 U.S. 342, 352 [same]; *Patterson v. New York* (1977) 432 U.S. 197, 202 [due process violation occurs only in the case of a violation of “‘some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental’”]; *Cupp v. Naughten* (1973) 414 U.S. 141, 145-149 [instruction that witnesses are presumed to speak the truth may ‘“impinge”’ on the right to proof beyond the reasonable doubt but is not unconstitutional]; *People v. Falsetta* (1999) 21 Cal.4th 903, 913 [admissibility of evidence and related jury instructions].)

California requires that a jury be instructed pursuant to CALJIC No. 4.71.5. But in a case where the jury is instructed on the burden of proof, reasonable doubt, and the unanimity requirement as occurred here in full compliance with CALJIC Nos. 2.90 and 17.50, the failure to give CALJIC No. 4.71.5 cannot be said offend a “‘principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” (*Patterson v. New York*, *supra*, 432 U.S. p. 202; *Cupp v. Naughten*, *supra*, 414 U.S. at pp. 149-150.) If the incorrect instructions in *Cupp* that witnesses, including those called by the prosecution, are presumed to speak the truth did not violate the Fourteenth Amendment Due Process Clause, then the omission of CALJIC No. 4.71.5 when the jury was instructed pursuant to CALJIC Nos. 2.90 and 17.50, cannot be said to constitute federal constitutional error. More to the point, the United Supreme Court held in *Victor v. Nebraska*, *supra*, 511 U.S. at page 5, that so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the

Fourteenth Amendment Due Process Clause does not require that any particular instruction be given.

One additional comment is in order concerning the application of the Fourteenth Amendment Due Process Clause to CALJIC No. 4.71.5 when the jury is instructed pursuant to CALJIC Nos. 2.90 and 17.50. CALJIC No. 4.71.5 sets forth a unanimity requirement. The Attorney General is correct in his contention that the Fourteenth Amendment Due Process Clause does not require jury unanimity. (*Johnson v. Louisiana* (1972) 406 U.S. 356, 359; *People v. Vargas* (2001) 91 Cal.App.4th 506, 562.) Although the analysis concerning the reasonable doubt and burden of proof instruction in *Victor* is controlling, the absence of a specific unanimity requirement imposed in state court trials by the Fourteenth Amendment Due Process Clause is an additional reason no federal constitutional error occurred in this case where the jury is instructed pursuant to CALJIC Nos. 2.90 and 17.50.

The state of Fourteenth Amendment Due Process Clause law as applied to CALJIC No. 4.71.5 when the jury is instructed pursuant to CALJIC Nos. 2.90 and 17.50 is this. *Victor* holds the Fourteenth Amendment Due Process Clause is satisfied when there is instruction in compliance with CALJIC No. 2.90. *Johnson* holds there is no unanimity requirement. Taken together, they establish an unmistakable rule of constitutional law under the Fourteenth Amendment Due Process Clause that when CALJIC Nos. 2.90 and 17.50 are given, there is no requirement that an unanimity instruction like CALJIC No. 4.71.5 be read to the jury.

Second, since no federal constitutional error occurred, we must apply the *People v. Watson*, *supra*, 46 Cal.2d at page 836 reversible error standard which requires that defendant prove there is a reasonable probability of a more favorable result had CALJIC No. 4.71.5 been given. *Watson* review involves an examination of the entire cause. The Supreme Court has held: '"As we have seen, the California reversible-error provision, by its terms, directs that the prejudicial nature of such an evidentiary error be determined "after an examination of the entire cause, including the evidence." (Cal. Const., art. VI, §

13.)' ([*People v.*] *Cahill* [(1993)] 5 Cal.4th 478, 502.) Under such circumstances, '[t]he prejudicial effect of such error is to be determined, for purposes of California law, under the generally applicable reasonable-probability test embodied in article VI, section 13 . . . . [Citing *Watson*, *supra*, 46 Cal.2d 818, 836.]' (*Cahill*, *supra*, 5 Cal.4th at pp. 509-510.)" (*People v. Breverman* (1998) 19 Cal.4th 142, 174, fn. omitted.) The Supreme Court described the nature of evidentiary review under the *Watson* standard as follows: "Appellate review under *Watson*, on the other hand, takes an entirely different view of the evidence. Such posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 177, original italics; accord *People v. Regalado* (2000) 78 Cal.App.4th 1056, 1063, fn. 5.)

In the present case, there is no reasonable probability of a different result had CALJIC No. 4.71.5 been given. To begin with, the jury was instructed pursuant to CALJIC Nos. 2.90 and 17.50 on reasonable doubt, the prosecutor's burden of proof, and unanimity. Further, the defense was one of complete denial that any sexual misconduct occurred. Defense counsel did not argue that there was a reasonable doubt whether "the same specific . . . or acts . . . constituting the crime . . . [occurred] within the period alleged" to paraphrase CALJIC No. 4.71.5. In other words, the issue raised by CALJIC No. 4.71.5 was not posited in the present case because defendant denied he ever engaged in intercourse with the victim.

Apart from the fact the legal issue presented by CALJIC No. 4.71.5 was not raised, in order to believe defendant, it was necessary to conclude the following witnesses were perjurers: the victim; Catalina G., the victim's mother and defendant's former girlfriend; Deputy Fernando Gonzalez who shot defendant; and Deputy Arturo Gabriel

and Sergeants Daniel Pollaro and Tony Lucia who were present when defendant confessed. At trial, defendant denied engaging in sexual conduct with the victim. The victim contradicted defendant's testimony. Ms. G. described how she ordered defendant to leave the residence after the revelation of his sexual misconduct. Defendant presented an entirely different story in which he denied he was ordered out of the residence by Ms. G. and claimed he stated he would return the next morning to take the victim to undergo a medical examination. Defendant testified he was shot for no reason. By contrast, Deputy Gonzalez testified as to defendant's highly provocative conduct which precipitated the shooting. Defendant denied confessing and claimed his questioners physically abused him. Deputy Gabriel and Sergeants Pollaro and Lucia testified defendant confessed. Deputy Gabriel and Sergeants Pollaro and Lucia made no mention of any physical abuse. Simply stated, in order for defendant's testimony to be the truthful, it is necessary to conclude the victim, Ms. G., Deputies Gonzalez and Gabriel, and Sergeants Pollaro and Lucia were all perjurers.

Defendant's confession is particularly telling evidence. Experience teaches us that jurors do not disregard confessions . The United States Supreme Court has noted: "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.' [Citations.]." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 296; see *Collazo v. Estelle* (9th Cir.1991) 940 F.2d 411, 424.) The California Supreme Court has noted in a similar vein, '"[T]he confession operates as a kind of evidentiary bombshell which shatters the defense."' (*People v. Cahill, supra,* 5 Cal.4th at p. 497; *In re Whitehorn* (1969) 1 Cal.3d 504, 516.)

Further, it is difficult to imagine that the jurors would have believed defendant's confession as accurate as to perhaps one count but not another. The jury was instructed

pursuant to CALJIC No. 2.21.2 that if a witness testified falsely as to a material part, that person's testimony could be rejected in its entirety.[2] It is highly unlikely a rational juror would have found defendant was lying when he denied molesting the victim but believed him when he denied confessing to the deputies. For the same reason, it is just as unlikely a juror would have believed defendant was guilty of some but not all of the charges. Finally, defendant's confession not only corroborated the victim's testimony but elaborated upon it as well.

It is noteworthy that the jury found defendant guilty of five counts. Defendant confessed he engaged in sexual intercourse, as distinguished from fondling and the like, on five occasions. The prosecution tried the case on the theory defendant's confession was factually accurate. The jurors obviously believed when defendant confessed, he was being truthful. If the jury accepted defendant's confession as being true, which it did, the CALJIC No. 4.71.5 unanimity instruction would have added nothing.

Third, even under the *Chapman* harmless error standard, the judgment would still be affirmed. The United States Supreme Court has repeatedly noted that in conducting *Chapman* harmless error analysis, we must evaluate "'the entire record . . . .'" (*Rose v. Clark* (1986) 478 U.S. 570, 583; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681; *United States v. Hasting* (1983) 461 U.S. 499, 509, fn. 7, 510.) The initial step in *Chapman* analysis for a reviewing court is as follows, "First, it must ask what evidence the jury actually considered in reaching its verdict." (*Yates v. Evatt* (1991) 500 U.S. 391, 404, disapproved on another point in *Estelle v. McGuire* (1991) 502 U.S. 62, 73, fn. 4; accord *People v. Harris* (1994) 9 Cal.4th 407, 426.) Then, a reviewing court "must then

---

[2] CALJIC No. 2.21.2 states: "A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars."

weigh the probative force of that evidence as against the probative force of the [erroneous instruction] standing alone." (*Yates v. Evatt*, *supra*, 500 U.S. at p. 404; *People v. Harris*, *supra*, 9 Cal.4th at p. 426.) Further, in conducting federal constitutional review, the United States Supreme Court has held, "An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." (*Henderson v. Kibbe* (1977) 431 U.S. 145, 155, *Villafuerte v. Stewart* (9th Cir. 1997) 111 F.3d 616, 624.) Finally, in *Pope v. Illinois* (1987) 481 U.S. 497, 503, footnote 6, the United States Supreme Court indicated its prior holding in *Rose v. Clark*, *supra*, 478 U.S. at pages 579-580 required on appeal the record be reviewed to determine whether "the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same."

The foregoing factual analysis concerning reversible error utilizing the *Watson* standard applies equally to the *Chapman* test. The issues posited by CALJIC No. 4.71.5 were not litigated in the trial court. Defendant's instructional error claim involves an omission--not a misstatement of law. Defendant denied engaging in any sexual misconduct. In order for defendant to be believed, the victim, Ms. G., Deputies Gonzalez and Gabriel, and Sergeants Pollaro and Lucia had to all be lying. Finally, the jurors accepted his confession as being the truth. Any federal constitutional error was harmless beyond a reasonable doubt.

V. DISPOSITION

The judgment is conditionally reversed with directions to conduct further proceedings in compliance with part II of this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

I concur:

ARMSTRONG, J.

MOSK, J.

I concur in part and dissent in part. I dissent from the majority's holding that the trial court abused its discretion in denying defendant's *Pitchess* motion,[1] because I believe that defendant failed to provide a "'specific factual scenario' establishing a 'plausible factual foundation'" for his allegation of police misconduct. (*City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1146.) I concur in the majority's holding that the trial court did not err in admitting evidence of defendant's admissions. And I dissent from the majority's holding that, although the failure to give a unanimity instruction (either CALJIC No. NO. 4.71.5 or CALJIC No. 17.01) constituted error, it was not a federal constitutional error. I would hold that the failure to give a unanimity instruction under the circumstances of this case violated the Sixth and Fourteenth Amendments of the United States Constitution, that the error therefore must be reviewed under the *Chapman* standard[2] and that, applying that standard, reversal is required.

A. Denial of Defendant's Pitchess Motion

A party seeking discovery from a peace officer's personnel records through a *Pitchess* motion must comply with Evidence Code sections 1043 through 1047. "[T]he *Pitchess* motion must describe 'the type of records or information sought' (Evid. Code, § 1043, subd. (b)(2)) and include '[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records' (*id.*, subd. (b)(3)). The affidavits may be on information and belief and need not be based on personal

---

[1] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

[2] *Chapman v. California* (1967) 386 U.S. 18.

knowledge ([*City of*] *Santa Cruz* [*v.Municipal Court* (1989)] 49 Cal.3d [74,] 84), but the information sought must be requested with sufficient specificity to preclude the possibility of a defendant simply casting about for any helpful information (*id.* at p. 85)." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226.) To set forth the materiality of the information sought, the affidavits must "provide a 'specific factual scenario' establishing a 'plausible factual foundation'" for the moving party's allegation of police misconduct. (*City of San Jose v. Superior Court*, *supra*, 67 Cal.App.4th at p. 1146.)

Defendant's *Pitchess* motion sought information from the personnel files of Detective Pollaro, Detective Lucia, and Deputy Gabriel regarding any complaints made against the officers alleging "that the officers committed acts of illegal arrest, improper search and seizure, acts of dishonesty, and acts which produce and/or contribute to coerced confessions, and the improper use of force, violence, or threats." Defendant's attorney, Rickard Santwier, filed a declaration in support of the motion, in which Mr. Santwier stated that the material defendant was seeking was relevant because "[t]he defendant contends that an April 5, 2000 interview of him at Twin Towers was obtained by use of illegal police conduct and use of force, in violation [of defendant's] right to remain silent and in violation of his request for an attorney right then." Mr. Santwier then set forth facts related to defendant's arrest and his assertion of his right to an attorney; Detective Pollaro's[3] presentation of the case to the District Attorney's office; the District Attorney's office's request for further investigation; and the following two paragraphs:

> i. That on April 5, 2000, Detective Pollardo, his partner Detective Lucia, and Spanish-speaking Deputy Gabriel contacted Mr.

---

[3] Throughout the motion defendant misspelled Detective Pollaro's name as "Pollardo."

> Ramirez at Twin Towers Correctional Facility, where Deputy Gabriel advised Mr. Ramirez of his rights. Mr. Ramirez asked for an attorney "right now". [*sic*] Detective Pollardo says that he told Mr. Ramirez they would have to talk later, and as the officers prepared to leave, Detective Pollardo related Mr. Ramirez said, "no, I want to talk right now". [*sic*] Deputy Gabriel asked if Mr. Ramirez wanted to talk without an attorney present and Mr. Ramirez said, "yes". [*sic*] Mr. Ramirez then made numerous admissions.
>
> j. That Mr. Ramirez says one of the officers squeezed his hand and wrist (where he had pins inserted), and the officers pulled on Ramirez' [*sic*] injured arm. He also denies making any admissions, and the statements are the product of improper tactics and should be excluded from his trial.

In ruling on defendant's motion, the trial court noted that defendant asserted that the officers squeezed his hand and pulled on his injured arm, but he denied that he made any admissions, so he could not be asserting that there was a forced confession. Therefore, the court denied the motion on the ground that Mr. Santwier's declaration failed to set forth a specific factual scenario to show that the material sought would be relevant to defendant's case.

The trial court in this case did not abuse its discretion by denying defendant's motion. Defendant contended in his motion that the police misconduct at issue was that the officers allegedly used "illegal police conduct and use of force" to obtain the April 5, 2000 interview of defendant in violation of defendant's right to remain silent and right to have an attorney present. But the declaration in support of defendant's motion did not provide a "specific factual scenario" to establish a "plausible factual foundation" for this allegation of police misconduct – it did not state that the officers squeezed or pulled on defendant's injured arm to force him to speak without his attorney present.

To the extent defendant sought the personnel file material because he intended to show that Detectives Pollaro and Lucia and Deputy Gabriel violated his right to remain silent and his right to an attorney simply by interviewing him, the declaration showed that the officers advised defendant of his rights, prepared to end the interview when defendant asked for an attorney, and continued the interview only after defendant expressly waived his rights. Although the scenario defendant set forth – defendant requested an attorney at the time of his arrest by Compton police officers, but the officers from the Sheriff's Department later sought to interview him without an attorney present – could be construed as a *Miranda*[4] violation (see, e.g., *Edwards v. Arizona* (1981) 451 U.S. 477, 488), that alleged violation alone would not justify discovery of the Sheriff's Department officers' personnel files. Defendant did not assert that the Sheriff's Department officers knew about defendant's alleged request to the Compton police officers and thus purposefully sought to violate defendant's *Miranda* rights. Therefore, any record of complaints made against these officers would be irrelevant to defendant's case because the declaration failed to show that the officers were involved in *misconduct* with regard to the alleged violation of defendant's *Miranda* rights.

Although some of the language in the declaration may seem to imply that the officers used physical force to get defendant to confess, defendant did not *specifically* contend in his motion that the Sheriff's Department officers coerced a confession from him through the use of force. Moreover, any implication in paragraph (i) that the officers forced defendant to confess was contradicted by paragraph (j)'s express language, because that paragraph states that defendant did not make any admissions. Therefore, by the declaration's own language, the alleged use of force was irrelevant to defendant's defense.

---

[4] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

Although defendant may now intend to contend that the officers fabricated their report that defendant admitted to having sexual relations with the victim, defendant failed to set forth that contention in his motion. Thus, the facts of this case are distinguishable from the facts in the cases upon which defendant relies because in each of those cases the defendant expressly stated how the alleged facts constituting the police misconduct related to his defense.

For example, in *People v. Gill* (1997) 60 Cal.App.4th 743, the defendant, through his counsel, "asserted that '[I]t will be a defense in this matter that the alleged contraband was placed on [defendant] by [the officer] to cover up for his use of excessive force and that the officer has [a] pattern of fabricating probable cause in dope cases.'" (*Id.* at p. 750.) Thus, the appellate court held that the defendant had demonstrated good cause for his request for records of complaints against the officer for fabrication of probable cause and planting of evidence. (*Ibid.*) Similarly, in *People v. Memro* (1985) 38 Cal.3d 658, the defendant's counsel's declaration "asserted that the [defendant's] confession had been coerced by promises of leniency and threats of violence." (*Id.* at p. 682.) Thus, the Supreme Court held that "[c]ounsel's allegations were sufficient to put the [trial]court on notice that the voluntariness of the confession would be in issue." (*Ibid.*) Finally, in *People v. Hustead* (1999) 74 Cal.App.4th 410, the defendant's counsel "asserted in his declaration that the officer made material misstatements with respect to his observations, including fabricating [defendant's] alleged dangerous driving maneuvers. He also stated that [defendant] asserted that he did not drive in the manner described by the report and that his driving route was different from that found in the report. In addition, he claimed that a material and substantial issue in the trial would be the character, habits, customs and credibility of the officer." (*Id.* at pp. 416-417.) Thus, the appellate court held that the defendant established "a plausible factual foundation for an allegation that the officer made false accusations in his report," which allegation the defendant intended to prove as a defense to the charge against him. (*Id.* at p. 417.)

Because defendant in this case did not set forth facts showing alleged police misconduct *and* demonstrating how alleged misconduct was relevant to his defense, the trial court's denial of his *Pitchess* motion was not an abuse of discretion.

B. Failure to Give Unanimity Instruction

Defendant was charged with five counts of lewd and lascivious act upon the minor daughter of his girlfriend. Each count alleged the identical facts, i.e., that defendant committed a lewd and lascivious act upon the victim between January 24, 1998 and March 26, 2000. At trial, there was evidence of many more than five acts that purportedly took place between those dates. Defendant denied any inappropriate touching of the victim, and offered different specific defenses to many of the alleged acts. The trial court failed to instruct the jury that, to reach a guilty verdict, all twelve jurors must agree on the specific acts constituting each crime they believe, beyond a reasonable doubt, that defendant committed. The court did not give CALJIC No. 4.71.5 (unanimity on each specific act) or CALJIC No. 17.01 (jurors must unanimously agree on same act in order to convict), one or both of which must be given sua sponte. (*People v. Laport* (1987) 189 Cal.App.3d 281, 283-284; *People v. Madden* (1981) 116 Cal.App.3d 212, 215-217.) Although there were five guilty verdicts, the failure to give a unanimity instruction permitted the jurors to reach those verdicts even if the jurors did not unanimously agree that defendant committed the same five acts. As discussed *post*, the failure to give the unanimity instruction could not be harmless error because defendant offered different defenses to different alleged acts, and there is nothing in the record to suggest that the jury unanimously agreed, beyond a reasonable doubt, that defendant committed the same five acts.

Neither the People nor the majority disagrees that the failure to give the CALJIC No. 4.71.5 or CALJIC No. 17.01 unanimity instruction was error. But the majority holds

that the trial court's failure to instruct under CALJIC No. 4.71.5 was not a violation of the federal Constitution because the jurors were instructed that the People had the burden of proving defendant guilty beyond a reasonable doubt (CALJIC No. 2.90) and that, in order to reach their verdict, all twelve jurors had to "agree to the decision" (CALJIC No. 17.50). Thus, the majority concludes, the instructions given here correctly convey the concept of reasonable doubt and therefore do not offend any fundamental principle of justice under the Fourteenth Amendment's due process clause (maj. opn., *ante*, at pp. 5-7) – even in the erroneous absence of an instruction, such as CALJIC No. 4.71.5, informing the jury that the People must prove beyond a reasonable doubt the specific acts constituting the crime and the jurors must unanimously agree upon the commission of the same specific acts constituting the crime. But because the instructions given in this case would allow the jury to convict the defendant even if less than a majority of the jurors agreed upon the commission of the same specific acts constituting the crime, under the applicable authorities the instructions violated both the due process clause and the Sixth Amendment right to jury, as applied to the states under the Fourteenth Amendment. Therefore, the conceded instructional error must be reviewed under the *Chapman* standard for harmless error, and that under that standard the error was prejudicial.

1. The instructional error violated federal constitutional rights

In a series of decisions from 1968 through 1979, the United States Supreme Court examined the constitutional requirements for a trial by jury under the Sixth Amendment, made applicable to the states by the Fourteenth Amendment. These decisions compel the

conclusion that the error violated defendant's federal, as well as California,[5] constitutional rights.

In *Duncan v. Louisiana* (1968) 391 U.S. 145, the Supreme Court held that the Fourteenth Amendment guarantees the right to a trial by jury in all criminal cases that, if the trial were held in a federal court, would come within the Sixth Amendment's guarantee of a trial by jury. (*Id.* at pp. 149-150.) Two years later, in *Williams v. Florida* (1970) 399 U.S. 78 (*Williams*), the court held that a 12-person jury panel is not a "necessary ingredient" of the "trial by jury" guaranteed by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. (*Id.* at p. 86.) In reaching this holding, the court found that the history of the development of trial by jury in criminal cases revealed "a long tradition attaching great importance to the concept of relying on a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement." (*Id.* at p. 87.) Given this safeguarding purpose for jury trials, the court concluded that "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." (*Id.* at p. 100.) The court determined that, although juries historically were comprised of 12 members, there was little reason to think that the "essential feature" of a jury would be compromised by the use of six-member jury panels in criminal trials. (*Ibid.*)

In a pair of cases decided two years after *Williams*, five justices held that less-than-unanimous jury verdicts in state criminal trials did not violate the Sixth Amendment right to trial by jury or the Fourteenth Amendment's due process clause, at least where

---

[5] California Constitution, article I, section 16.

the verdicts were 9-3, 10-2, or 11-1 in favor of guilt. (*Johnson v. Louisiana* (1972) 406 U.S. 356, 362 (*Johnson*) [9-3 verdict did not violate Fourteenth Amendment due process clause because "a substantial majority of the jury . . . were convinced by the evidence"]; *Apodaca v. Oregon* (1972) 406 U.S. 404 (*Apodaca*) [10-2 and 11-1 verdicts did not violate Sixth Amendment right to trial by jury].) In *Apodaca*, the court explained that its "inquiry must focus upon the function served by the jury in contemporary society," and concluded that "[i]n terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one." (*Apodaca*, *supra*, 406 U.S. at pp. 410-411.) In his concurring opinion in both cases, Justice Blackmun expressed his concern that a verdict of less than 9-3 may not satisfy constitutional requirements: "I do not hesitate to say, either, that a system employing a 7-5 standard, rather than a 9-3 or 75% minimum, would afford me great difficulty. As MR. JUSTICE WHITE points out, . . . 'a substantial majority of the jury' are to be convinced. That is all that is before us in each of these cases." (*Johnson*, *supra*, 406 U.S. at p. 366 (conc. opn. of Blackmun, J.).)[6]

Six years later, the Supreme Court again examined the function served by the jury and concluded that five-member jury panels violate criminal defendants' rights under the Sixth and Fourteenth Amendments. (*Ballew v. Georgia* (1978) 435 U.S. 223, 239

---

[6] In a separate opinion, Justice Powell concurred in *Johnson* and concurred in the judgment in *Apodaca*. Justice Powell agreed with the majority opinion in *Johnson* that less-than-unanimous convictions do not deprive defendants of due process under the Fourteenth Amendment, but he disagreed with the reasoning in the plurality opinion in *Apodaca*. (*Johnson*, *supra*, 406 at p. 366 (conc. opn. of Powell, J.).) Rather than holding that the Sixth Amendment does not require unanimous verdicts in criminal cases, Justice Powell would hold that the Sixth Amendment requires unanimity but that the unanimity requirement is not "necessarily embodied in or incorporated into the Due Process Clause of the Fourteenth Amendment," and therefore it is not applicable to the states. (*Id.* at p. 369.)

(*Ballew*).) Although the court "readily admit[ted] that [it did] not pretend to discern a clear line between six members and five" (*ibid.*), it was concerned about the ability of a group smaller than six "to perform the functions mandated by the [Sixth and Fourteenth] Amendments" (*id.* at p. 241). The following year, the court held that a nonunanimous verdict by a six-member jury violates the Sixth and Fourteenth Amendments. (*Burch v. Louisiana* (1979) 441 U.S. 130, 139 (*Burch*).) In reaching this holding, the court noted that it had "approved the use of *certain* nonunanimous verdicts in cases involving 12-person juries" (*id.* at p. 137, italics added) and explained its reasons for rejecting nonunanimous verdicts when the jury has only six members: "As in *Ballew*, we do not pretend the ability to discern *a priori* a bright line below which the number of jurors participating in the trial *or in the verdict* would not permit the jury to function in the manner required by our prior cases. [Citations.] But having already departed from the strictly historical requirements of jury trial, it is inevitable that lines must be drawn somewhere if the substance of the jury trial right is to be preserved." (*Burch*, *supra*, 441 U.S. at p. 137, italics added.)

From this line of cases, it is clear that the Sixth and Fourteenth Amendments require at least a *majority* (and perhaps a "substantial majority") of a 12-member jury panel to render a verdict. Without such a requirement, the "essential feature" of the jury is lost, because allowing a verdict by less than a majority of jurors eliminates the "safeguard against arbitrary law enforcement" that lies at the heart of the right to trial by jury. (*Williams, supra,* 399 U.S. at pp. 87, 100.)

The error in failing to give the CALJIC No. 4.71.5 unanimity instruction in this case violates the Sixth and Fourteenth Amendments because the instructions as given – and the majority's analysis – would allow the jury to convict defendant even if a majority of the jurors did not agree that defendant committed the same specific acts constituting the crimes with which he was charged, as long as each juror believed that defendant committed *some* act constituting the crime. For example, six jurors could have believed,

beyond a reasonable doubt, that defendant committed the five acts of intercourse by virtue of his alleged admission, but *dis*believed the victim's testimony of other acts of molestation. The other six jurors could have disbelieved that defendant made the purported admission but believed the victim's testimony. In that scenario – which was permissible under the instructions given and the majority's analysis – defendant would be convicted even though *no more than half of the jurors believed beyond a reasonable doubt that he committed any one of the acts* about which testimony was given. In order to convict defendant on five counts, the jurors must agree beyond a reasonable doubt that defendant committed the acts that are the basis of each of the five counts. Thus, under the United States Supreme Court authorities, the failure to instruct with CALJIC No. 4.71.5 or a similar instruction that required the jurors to agree upon the same specific acts to reach a verdict constituted a violation of the federal Constitution, and the error therefore must be reviewed under the *Chapman* standard.

This conclusion is consistent with a long line of California appellate cases, starting with *People v. Deletto* (1983) 147 Cal.App.3d 458, 471-472 (*Deletto*), in which the court held that the failure to give the unanimity instruction violated the federal constitutional right that the jury agree beyond a reasonable doubt that defendant committed the act constituting a crime. After *Deletto* was decided, most California courts applied the *Chapman* standard (see, e.g., *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536 [applying *Chapman* standard]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 615, fn. 13 [noting that *Deletto* and subsequent cases have determined that *Chapman* standard applies], disapproved on other grounds in *People v. Russo* (2001) 25 Cal.4th 1124, 1137) – at least until 2001, when the court in *People v. Vargas* (2001) 91 Cal.App.4th 506, 562, stated in dictum, without analysis of other authority, that *Chapman* does not apply "because the requirement for jury unanimity in a criminal prosecution is a state constitutional requirement" rather than a federal constitutional requirement. In *Vargas*, the court simply said that because there was no right to a unanimous verdict under the

United States Constitution, whether defendant was entitled to a unanimity instruction is a state issue. The court ignored the fact that there appears to be a federal constitutional requirement of at least some plurality verdict.

2. The error was prejudicial

Under the *Chapman* standard, when the defendant offers only a single defense to all of the acts and is convicted, courts have concluded that any error in failing to give the unanimity instruction is harmless because the jury necessarily did not believe the defendant's only defense. (See, e.g., *Deletto*, *supra*, 147 Cal.App.3d at p. 473; *People v. Gordon* (1985) 165 Cal.App.3d 839, 855, disapproved on other grounds in *People v. Lopez* (1998) 19 Cal.4th 282, 292; see also *People v. Thompson* (1995) 36 Cal.App.4th 843, 853 ["Where the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless"].) But when, as in this case, the defendant offers different defenses, some of which may apply to some of the acts and not to others, the courts addressing this issue have concluded that the failure to give a unanimity instruction is not harmless beyond a reasonable doubt because the jurors "may disagree as to which act the defendant was guilty of and yet convict him." (*People v. Gonzalez* (1983) 141 Cal.App.3d 786, 792, disapproved on other grounds in *People v. Kurtzman* (1988) 46 Cal.3d 322, 330; see also *People v. Thompson*, *supra*, 36 Cal.App.4th at p. 853 [reversing judgment because defendant's "different defenses gave the jury a rational basis to distinguish between the various acts]; *People v. Laport*, 189 Cal.App.3d at pp. 283-284 [reversing judgment because defendant offered different defenses to different acts]; *People v. Gordon*, *supra*, 165 Cal.App.3d at pp. 855-856 [reversing judgment as to sodomy count when there was testimony of two acts of

sodomy, "[b]ecause some of the jurors may have believed the lack of opportunity defense to the second act, and other jurors not, and because some jurors may have believed there was penetration with respect to the first act of sodomy but not the second"].)

In the present case, defendant presented different defenses to different alleged acts. In addition to testifying that he never touched the victim in a sexual way, defendant presented evidence that the first act of attempted intercourse the victim identified – which the victim testified occurred at defendant's place of business early in the morning before working hours – could not have happened as the victim described because defendant was not one of the three people who had keys and an alarm code to allow him to enter the building during nonbusiness hours. He also presented evidence that he could not have had intercourse with the victim at home during the afternoons, as the victim described, because he was at work during the afternoon.[7] Finally, he testified that he did not make the admissions attributed to him, i.e., that he had sexual intercourse with the victim five times and other sexual contact five times. Some of the jurors may have believed that defendant did not engage in the conduct the victim described (i.e., intercourse or attempted intercourse at his business or at home during the afternoon), but believed that defendant made the admissions concerning other acts. Other jurors may have believed

---

[7] The testimony defendant presented (from defendant's supervisor) did not completely exclude the possibility that he could have been home during the afternoon on some of the days within the time period set forth in the information, because defendant changed jobs several weeks before his arrest. There was no testimony that defendant could not have been home in the afternoon after he left his previous job. Nevertheless, because the victim did not specify the days on which the acts allegedly took place, and because defendant's defense (if believed) could exclude any acts that allegedly took place before he changed jobs, the error was prejudicial. (See *People v. Alva* (1979) 90 Cal.App.3d 418, 421-423 [reversal required where minor testified to acts of intercourse regularly between February and July and the minor's brother, who testified that the defendant did not have intercourse with the minor while the brother was living with the defendant, moved into the defendant's house in May].)

that defendant did not make the admissions but believed the victim's testimony about other acts.

It is true that there was strong evidence that defendant molested the victim and that, in order to believe defendant's various defenses, the jury would have to disbelieve *some* of the testimony of *some* of the witnesses. But that is also true in all of the unanimity instruction cases (several of which I cite above) in which judgment was reversed because defendant generally denied committing *any* crime and offered different specific defenses to different acts. And in those cases, the courts held that reversal was required, even when there was strong evidence of the defendant's guilt, because it could not be determined whether all of the jurors believed or disbelieved the same testimony.

Because it cannot be established that all of the jurors in this case believed or disbelieved the same defenses, the error in not giving the unanimity instruction was not harmless beyond a reasonable doubt. Therefore, I would reverse the judgment.

MOSK, J.